(3)



No. 96-667

# In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROBERT E. HYDE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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11 pp

## TABLE OF AUTHORITIES

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Respondent acknowledges that the circuits are divided on the question presented by the petition—whether a defendant whose guilty plea has been accepted by a district court retains an absolute right to withdraw that plea at any time before the district court has decided whether to accept or reject an accompanying plea agreement. Br. in Opp. 12. He contends, however, that the Court should deny review because, in his view, the conflict would better be resolved by amendments to the Sentencing Guidelines or Federal Rules of Criminal Procedure (*id.* at 7-11); there is no concrete evidence on how often criminal defendants seek to withdraw guilty pleas before a district court decides whether to accept the plea agreement (*id.* at 12-14); and only three circuits have

considered the issue. Respondent also argues that the decision below does not conflict with the scheme for accepting and withdrawing guilty pleas under the Federal Rules of Criminal Procedure. None of those contentions has merit.

1. Respondent contends that the drafters of the Federal Rules of Criminal Procedure or Sentencing Guidelines could ameliorate the circuit conflict raised in this case. Br. in Opp. 7-11. That claim provides no basis for denying review here.

The Sentencing Commission could not resolve the issue before this Court. The issue in this case is whether the court of appeals' holding violates the Federal Rules of Criminal Procedure. The Sentencing Commission has no power to alter that holding. It is true that the Sentencing Commission has issued a policy statement generally requiring a court to "defer its * * * decision to accept or reject any plea agreement pursuant to [Federal] Rules [of Criminal Procedure] 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report." Guidelines § 6B1.1(c). In practice, that procedure means that there will usually be a significant gap in time between the court's taking of a guilty plea under Rule 11 and its ultimate decision whether to accept or reject the plea agreement. But the Sentencing Commission could not mandate that that gap be closed. Rule 11(e)(2) of the Federal Rules of Criminal Procedure gives sentencing courts the discretion to defer acceptance of the plea agreement "until there has been an opportunity to consider the presentence report." Fed. R. Crim. P. 11(e)(2). The Commission could not prevent a district court from taking the sensible course, which the Rules allow, of deferring



consideration of the plea agreement until the court has reviewed the presentence report.

The drafters of the Federal Rules of Criminal Procedure could, of course, "resolve" the circuit conflict, either by providing (even more expressly than the Rules already do) that the court of appeals' holding is in error, or, alternatively, by changing the Rules to conform to the court of appeals' decision. Since the Rules already speak clearly to the issue in this case, see Pet. 8-10, it makes little sense to require an amendment of the Rules to repeat what the Rules already require. Moreover, the possibility of an amendment to the Rules exists in every case involving their construction. That possibility has not deterred this Court from resolving circuit conflicts that arise in the interpretation of the Rules. See, *e.g.*, *Libretti* v. *United States*, 116 S. Ct. 356, 362 & nn. 3-4 (1995) (granting certiorari to resolve conflicts over the interpretation of Fed. R. Crim. P. 11(f) and 31(e)); *Carlisle* v. *United States*, 116 S. Ct. 1460 (1996) (reviewing interpretation of Fed. R. Crim. P. 29(c)).*

In any event, changes to the Sentencing Guidelines or the Federal Rules of Criminal Procedure could

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* The Ninth Circuit's decision in this case was brought to the attention of the Advisory Committee on Federal Rules of Criminal Procedure at its meeting on October 7-8, 1996. According to draft minutes (at page 5), the "Committee * * * requested the Reporter to draft alternative versions of possible amendments to Rule 11(e)(4) which would deal with the [*United States* v. *Harris*, 70 F.3d 1001 (8th Cir. 1995)] and *Hyde* decisions." The draft language is to be submitted at the Committee's April 7-8, 1997, meeting. Draft Minutes at 5. We have lodged a copy of the draft minutes with the Court and served it on respondent. The draft minutes have not yet been approved by the Committee.

create problems that the current rules are designed to avoid. As the Sentencing Commission has explained, a district court should not accept a plea agreement calling for dismissal of charges under Rule 11(e)(1)(A) or calling for a specific sentence under Rule 11(e)(1)(C) unless the court is confident that the disposition will not undermine or unjustifiably depart from the Sentencing Guidelines. See Guidelines § 6B1.2 (commentary). A court would find it difficult to make that determination absent an opportunity to consult the presentence report. That is why the Guidelines require the court to defer its acceptance or rejection of a plea agreement until the presentence report is available. Rule 11 procedures, for their part, are designed to ensure the entry of a knowing and voluntary plea of guilty. It would denigrate those careful procedures to permit a guilty plea to be revocable at will for a substantial time after its entry. It would also create uncertainty for trial judges, prosecutors, witnesses, and victims.

Respondent suggests that the courts could alleviate some of those concerns by having a presentence report prepared before entry of the guilty plea. Br. in Opp. 9. That course, however, would require the Probation Office to devote resources to a presentence report before the court even knows whether the defendant will be found or will plead guilty; it would often require preparation of the report without the cooperation of the defendant (who still would have a full interest in asserting Fifth Amendment rights); and it would delay the resolution of the defendant's guilt or innocence (in tension with the provisions and purposes of the Speedy Trial Act). The drafters of the Rules wisely avoided mandating a practice that would have those adverse effects.



2. Respondent contends that the circuit conflict in this case is "neither deep nor engrained." Br. in Opp. 12. Three circuits, however, have addressed this issue, and two of them reached the opposite result from the Ninth Circuit in this case. See Pet. 11-12. The full Ninth Circuit denied the government's suggestion that this case be reheard en banc. Pet. App. 6a-7a. The conflict will thus persist absent this Court's review.

A decision that introduces such substantial instability into the plea negotiation process (see Pet. 12-16) in the largest circuit in the Nation warrants this Court's intervention. Respondent is correct that our petition does not cite statistics on how often guilty pleas are accompanied by plea agreements (Br. in Opp. 12), or on how often defendants seek to withdraw from pleas (*id.* at 13). In the experience of the Department of Justice, however, the vast majority of guilty pleas in federal court are accompanied by plea agreements, and defendants not infrequently seek to extricate themselves from guilty pleas based on post-plea changes of heart. (The many cases cited in United States Code Annotated interpreting the "fair and just reason" standard of Fed. R. Crim. P. 32(e) attest to the frequency with which defendants seek to withdraw guilty pleas.) A decision that renders Rules 11(e)(1)(A) and 11(e)(1)(C) plea agreements revocable at the will of the defendant for a significant period of time is an open invitation to the disruption of the orderly resolution of cases through guilty pleas.

3. Finally, respondent argues that the court of appeals' holding is correct. Br. in Opp. 14-18. In respondent's view, the court's holding rests on the "fact" that "deferment of acceptance of the plea agreement necessarily carries with it deferment of accep-

tance of the guilty plea." *Id.* at 15. As we explain in our petition (at 8-11), however, the Rules provide otherwise: a guilty plea, once accepted in accordance with Rules 11(c), (d), and (f), is valid and binding unless the defendant withdraws it *after* the district court has rejected a charge-dismissal or specific-sentence plea agreement (Rule 11(e)(4)) or unless the defendant shows a "fair and just reason" for withdrawal (Rule 32(e)). The automatic-withdrawal right posited by the court of appeals conflicts with that scheme.

Respondent errs in suggesting that the government has, as a general matter, agreed with the Ninth Circuit's holding in *United States* v. *Cordova-Perez*, 65 F.3d 1552 (1995), cert. denied, 117 S. Ct. 113 (1996), that "acceptance of a guilty plea is inherently conditional upon the later acceptance of the plea agreement." Br. in Opp. 16, quoting a portion of U.S. Br. in Opp. at 6 n.4, *Cordova-Perez* v. *United States*, cert. denied, 117 S. Ct. 113 (1996) (No. 95-9101). In *Cordova-Perez*, a plea agreement called for the government to dismiss a greater charge and for the defendant to plead guilty to a lesser-included charge. The district court accepted the plea, but later rejected the plea agreement. It then vacated the earlier-entered guilty plea to the lesser-included charge and ordered the case to trial on the greater charge. The Ninth Circuit affirmed, rejecting the defendant's claim that the court should not have permitted trial on the greater charge. The court of appeals reasoned that "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea," thus rendering the guilty plea "conditional." 65 F.3d at 1556.



Our brief in opposition to the defendant's petition for a writ of certiorari defended the judgment, but we did not endorse the court of appeals' analysis as a general matter. Rather, we said:

> As petitioner points out (Pet. 7), the court of appeals stated that the district court's acceptance of petitioner's guilty plea itself was "conditional," explaining that "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Pet. App. A, 1556. In practice, that is the logical consequence of a district court's determination to defer acceptance or rejection of a plea agreement that calls for the government to dismiss a charge on a greater offense. See Fed. R. Crim. P. 11(e)(1)(A). Normally, if a district court rejects a plea agreement under Rule 11(e)(1)(A) or (C), it must "afford the defendant the opportunity to then withdraw the plea." Fed. R. Crim. P. 11(e)(4). When a court rejects a plea agreement that would require the government to dismiss a charge on a greater offense, however, the court necessarily has determined not to accept the plea to the lesser offense. In such a case, the court's earlier acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement.

U.S. Br. in Opp. at 6 n.4, *Cordova-Perez* v. *United States*, *supra*. Thus, our statement that "*[i]n such a case*, the court's earlier acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement" was limited to the circumstances in *Cordova-Perez*, *i.e.*, a plea agreement that calls for the dismissal of a greater charge and a guilty plea to a

lesser charge. That is not the case here. The issue in this case is whether, *as a general rule in all guilty plea cases*, acceptance of a guilty plea should be deemed conditional whenever a court defers acceptance or rejection of a plea agreement. Our brief in *Cordova-Perez* did not address that issue.

Nonetheless, upon further reflection we have concluded that even the statement in our brief in opposition in *Cordova-Perez* was incorrect. Even where, as in *Cordova-Perez*, a defendant has pleaded guilty to a lesser-included offense and the court has rejected a plea agreement calling for dismissal of charges on the greater offense, our statement that "the court's earlier acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement" is mistaken. If the district court accepts a plea in unqualified terms at a plea proceeding, nothing in the Federal Rules requires the counter-factual description of the court's action as "conditional" upon the court's later acceptance of an accompanying plea agreement. The only effect of the court's rejection of the plea agreement is that the defendant then has the right under Rule 11(e)(4) to withdraw his guilty plea.

This alteration in our analysis has no effect on our views regarding the validity of the court of appeals' decision in *Cordova-Perez*. As we note in the petition in this case (at 10 n.1), the defendant in *Cordova-Perez* did not object to the court's requirement that he face trial on the lesser-included offense without offering him the choice of adhering to his guilty plea. The defendant instead attacked the right of the government to try him on the greater offense after the district court refused to accept the plea agreement. The court of appeals correctly rejected that argu-



ment. That conclusion, however, provides no support for the court of appeals' holding here that a defendant may exercise a general privilege to withdraw his guilty plea until such time as the court accepts an accompanying plea agreement. Because that later holding cannot be reconciled with the structure of the Federal Rules of Criminal Procedure, this Court's review is warranted.

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For the forgoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*

DECEMBER 1996